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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

[redacted], on behalf of themselves and other similarly situated,

Plaintiffs,

v.

[redacted] in her official capacity as the San Francisco Sheriff, *et al.*

Defendants.

[redacted]

CBAA'S BRIEF REGARDING ISSUES PERTAINING TO INJUNCTIVE RELIEF

The Hon. [redacted]

I. Introduction

Pursuant to the Court's Civil Minute Order (Dkt. 324) following the hearing held on March 21, 2019 ("Hearing"), Defendant-Intervenor California Bail Agents Association ("CBAA") hereby submits the following arguments establishing why any injunction to be issued in this case must be limited to members of the certified class, e.g. "[a]ll pre-arraignment arrestees (i) who are, or will be, in the custody of the San Francisco Sheriff; (ii) whose bail amount is determined by the Felony and Misdemeanor Bail Schedule as established by the Superior Court of California, County of San Francisco; (iii) whose terms of pretrial release have not received an individualized determination by a judicial officer; and (iv) who remain in custody for any amount of time because they cannot afford to pay their set bail amount." Dkt. 314, pp.12-13.

This brief makes two arguments. First, it addresses the fact that Plaintiffs have *always* limited their claims and requested relief to class members through an "as applied" challenge, and they are prevented from seeking different and broader relief now, pursuant to the doctrines of judicial estoppel and law of the case, and in light of Plaintiffs' failure to meet (or even attempt to meet) the heightened standards applicable to facial challenges to state law. Plaintiffs should not be permitted to convert their "as applied" class action challenge into a facial challenge, *nunc pro tunc*. The vastly broader relief that Plaintiffs now propose – which would eliminate the Bail Schedule for all arrestees who fall outside the class definition – would render non-class member arrestees indispensable parties under Rule 19 (e.g. individuals whose rights would be materially impaired by virtue of disposition of the action in their absence), and would contravene the purpose of Rule 23 by failing to afford individuals an opportunity to be heard, object, or raise concerns in litigation that affects their rights.

Second, this brief explains the legal inaccuracy of Plaintiffs' argument at the Hearing – namely, that the Equal Protection Clause requires wholesale elimination of the Bail Schedule as to *all* pre-arraignment arrestees – given that 1) this case has never proceeded as a purely Equal Protection Clause claim (nor could it, under governing law), and 2) the hybrid Equal Protection / Due Process claim that *was* pled and adjudicated, prohibits relief that extends beyond Plaintiffs' proposed alternative: namely, "[sole] rel[iance] on the current computerized risk assessment process when dealing with members of the plaintiff class," "in lieu of [the Sheriff's] continued use of the

Bail Schedule against members of the plaintiff class." Dkt. 221, p. 3 (Plaintiffs' Revised Notice of Plausible Alternatives) (emphasis added).

For the reasons discussed below, CBAA agrees with the Court that "[p]rinciples of federalism limit the Court's review and counsel in favor of narrow relief to the extent required" (Dkt. 314, p.33-34 (citations omitted)), and CBAA supports the Court's conclusion that "[t]he Court is not considering the wholesale elimination of bail as it is outside the scope of this action." Dkt. 314, p.34. Relief in this case must be limited to class members.

II. The Overreaching Injunction Requested by Plaintiffs in the 11th Hour is Prohibited by Plaintiffs' "As-Applied" Challenge and the Federal Rules of Civil Procedure

Critical to the issue of relief is the fact that Plaintiffs have always argued that the Bail Schedule is unconstitutional "as applied" to class members – not on its face. *See, e.g.,* Dkt. 71 ("TAC"), ¶101 (seeking an order declaring Penal Code §1269b(b) to be unconstitutional "as applied by Defendants against Plaintiff and Class Members"). In light of their "as applied" challenge, Plaintiffs have properly limited the scope of their requested relief to an injunction against the use of money bail to detain indigent arrestees without an inquiry into ability to pay. For example:

- Plaintiffs' operative Complaint (filed May 2016) seeks a judgment permanently enjoining the Sheriff from using money bail to detain **class members** without an inquiry into ability to pay. *See* TAC, pp. 21. The TAC seeks "declaratory and injunctive relief to enjoin the Sheriff and San Francisco from detaining **arrestees who cannot afford their money bail amounts.** Dkt. 71 (TAC), ¶101 (emphasis added). The Request for Relief set forth in the TAC seeks an order "declaring that, **as applied** by Defendants **against Plaintiff and Class Members,** California Penal Code section 1269b(b) and any other state statutory or constitutional provisions that require the use of secured money bail to detain any person without an inquiry into ability to pay are unconstitutional." TAC, p. 21 (emphases added). Plaintiffs further seek an injunction against enforcement of "wealth-based detention policies and practices **against the named Plaintiffs and the Class**...," and an order enjoining "the use of money bail to detain **indigent arrestees** in San Francisco") (emphases added);
- In December 2017, the Court ordered Plaintiffs to "clarify the relief they are seeking" (Dkt. 178, p.2), and in response, Plaintiffs confirmed that they "seek an order declaring

unconstitutional and enjoining the use of the bail schedule **for the class** (as redefined)," as well as "an injunction that outlines a framework for a replacement, non-monetary process **for the class**..." Dkt. 181, p. 2 (emphases added);

- On January 16, 2018, the Court issued an Order denying Plaintiffs' and CBAA's cross-motions for summary judgment and requiring Plaintiffs to make a prima facie showing of a "plausible, less restrictive alternative" that is "at least as effective" at achieving the government's compelling interests (Dkt. 191, p. 18), and on January 22, 2018, the Court ordered Plaintiffs to file a notice of their proposed alternatives. Dkt. 202. In complying with this order, Plaintiffs described each of their proposed alternatives as "alternatives to Defendant's use of a money bail schedule **for class members in the proposed class**." Dkt. 205, p.1 (emphasis added);
- In March 2018, the Court ordered that Plaintiffs' new counsel, Latham & Watkins LLP, file a revised notice of "plausible alternatives." Dkt. 219. In response, Plaintiffs again informed the Court that they "intend[ed] to prove that, in lieu of its continued use of the Bail Schedule **against members of the plaintiff class,** the Sheriff's Department could: (1) rely solely on a computerized risk assessment process (such as the current San Francisco Safety Assessment ("PSA")) **for all members of the class…"** among other alternatives.[1] Dkt. 221, p. 2 (emphasis added). Plaintiffs further argued that "[e]ach of these alternatives would not involve the use of a predetermined Bail Schedule **with respect to the plaintiff class."** *Id.* (emphasis added), *citing* Order Granting Plaintiffs' Motion for Class Certification as Modified by The Court, at p.3;
- In their second summary judgment motion, filed September 2018, Plaintiffs adopted the same "plausible alternative" as they had identified six months prior – e.g., to rely solely on a risk assessment process for class members. *See* Dkt. 282, p. 19, *citing* Dkt. 221.

[1] Plaintiffs also proposed two other alternatives, but as their summary judgment motion "focuses on the first of the three proposed alternatives," the Court tailored its summary judgment analysis according to the first proposal. Dkt. 314, p.32, FN59. Notably, even the alternative proposals made by Plaintiffs were narrowly tailored to the class, e.g. "(2) re-institute the San Francisco interview process **for all members of the plaintiff class**…" Dkt. 221, p.3 (emphasis added).

In short, Plaintiffs have *always* confined their requested injunctive relief to the class, in line with their as-applied challenge. As such, and in accordance with the doctrine of judicial estoppel, the Court should exercise its discretion to prevent Plaintiffs from drastically modifying their relief in the 11th hour of this case, in a way that wholly undermines their case theory over the past four years. *See, e.g., Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir. 1990) (judicial estoppel is an equitable doctrine that the court has discretion to invoke to prevent a litigant from taking contradictory positions); *Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council,* 851 F.2d 1208, 1210 (9th Cir. 1988) (the doctrine of judicial estoppel is "intended to protect against a litigant playing 'fast and loose with the courts.'" (citations omitted)).

The application of judicial estoppel to the relief issue is particularly warranted where Plaintiffs were given numerous opportunities to clarify the scope of their relief and repeatedly failed to ask for the sweeping injunction they now propose. As explained by the Court in its first summary judgment Order:

> "While the Court has articulated the scope of this case on numerous occasions, plaintiffs' summary judgment briefing indicated an attempt to alter the scope of the case drastically. Namely, plaintiffs asked the Court to '[d]eclare unconstitutional and enjoin the use of money bail and all pretrial processes that condition release on a monetary sum extracted from a criminal defendant. [citations to Dkt. 136 at p.25]. Moreover, they argued the Court should '[d]eclare unconstitutional and enjoin the enforcement of all state laws that create wealth-based pretrial release processes, including but not limited to California Penal Code sections 1270.1, 1269b, and 1269c. **In light of the overreaching, and unauthorized, scope of the relief sought by plaintiffs at this late stage in the litigation,** the Court asked them recently to clarify the relief they are seeking. (*See* Dkt. No. 178.) Plaintiffs responded that they 'seek an order declaring unconstitutional and enjoining the use of the bail schedule **for the class**...[and] an injunction that outlines a framework for a replacement, non-monetary process **for the class**..." Dkt. 191, pp.5-6 (emphases added).[2]

This finding – that Plaintiffs' request for a wholesale injunction of the Bail Schedule is "overreaching and unauthorized" in light of the claims pled – applies with equal force today and should be followed as law of the case. *See, e.g. Askins v. U.S. Department of Homeland Security,* 899 F.3d 1035 (9th Cir. 2018) ("law-of-the-case doctrine generally provides that 'when a court

[2] *See also* transcript of CMC held on February 28, 2018 ("Court notes that "I do not believe that the plaintiffs have ever suggested that everybody be held until arraignment; that is, they're not suggesting that people with money also remain incarcerated until arraignment").

decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'"), *citing Musacchio v. U.S.,* 136 S.Ct. 709, 716 (2016).

Notably, only after the Court granted Plaintiffs' summary judgment motion on March 4, 2019, did Plaintiffs begin to explicitly argue that use of the Bail Schedule should be enjoined entirely. *See, e.g.* Dkts. 318; 321-1. Yet if Plaintiffs had wanted to invalidate Penal Code §1269b on its face, they would have been required to give notice of that claim and proceed under the far more difficult "facial challenge" standard. Indeed, a facial challenge to a legislative Act is "'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid.'" *Alphonsus v. Holder,* 705 F.3d 1031, 1042 (9th Cir.2013) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987) (brackets in original)); *see also Isaacson v. Horne*, 716 F.3d 1213, 1230–31 (9th Cir.2013) (*Salerno*'s "no set of circumstances" standard applies to all facial challenges except in First Amendment and abortion cases); *Alphonsus*, 705 F.3d at 1042 n. 10 (same). "[A] generally applicable statute is not facially invalid unless the statute 'can never be applied in a constitutional manner,'" *United States v. Kaczynski*, 551 F.3d 1120, 1125 (9th Cir.2009) (quoting *Lanier v. City of Woodburn*, 518 F.3d 1147, 1150 (9th Cir.2008) (emphasis in original)). Plaintiffs failed to state – much less litigate – a facial challenge to the Bail Schedule, and cannot now seek relief that flows therefrom.

Finally, by definition, injunctive relief in an as-applied class action is properly limited to the class. *See* FRCP 23(c)(3) (judgment must "include and describe those whom the court finds to be class members"); *Italian Colors Rest. v. Becerra,* 878 F.3d 1165, 1175 (9th Cir. 2018) ("[w]hile 'a successful challenge to the facial constitutionality of a law invalidates the law itself,' a successful as-applied challenge invalidates 'only the particular application of the law'" (quoting *Foti v. City of Menlo Pari,* 146 F.3d 629, 635 (9th Cir. 1998)). Relief in an as-applied class action cannot bind non-class members; to do otherwise would render class certification superfluous and materially prejudice the rights and interests of non-class members, who had no notice or opportunity to be heard, object, or raise concerns. Rule 23(e), which discusses a settlement in a class action, requires advance notice to the class of any settlement proposal; a court hearing and findings concerning reasonableness, fairness, and adequacy whenever a settlement proposal "would bind class members"; and specific protocol by which class members may object to a settlement proposal. If, as Plaintiffs suggest, the

injunction against the use of the Bail Schedule can apply wholesale, then not only was there no purpose in certifying a class in this case, but there will be tens of thousands of people in San Francisco County whose liberty interests (indeed, "fundamental rights" as determined in this case) are materially impaired, without the same type of prior notice and opportunity to be heard as is afforded to class members.

In a similar and more fundamental way, if Plaintiffs' requested relief were granted, then all pre-arraignment arrestees who can afford their set Bail Schedule amount would be necessary parties whose joinder was required in this action pursuant to Federal Rule of Civil Procedure 19(a). It is beyond dispute that a non-indigent pre-arraignment arrestee would "claim an interest relating to the subject of the action [e.g., liberty prior to arraignment] and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest…" FRCP 19(a)(1)(B)(i).

In sum, Plaintiffs' requested relief is outside the scope of this action, is unsupported by law and federal civil procedure, and is estopped by the way in which Plaintiffs chose to style and litigate their claims.

III. The Injunction Plaintiffs Now Propose Is Not Narrowly Tailored to Address the Extent of the Constitutional Violation Found In This Case

"In general, relief must be narrowly tailored to address the extent of the constitutional violations found." Dkt. 314, p.40, *referencing Dayton Bd. Of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977); *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). Thus, the first question concerns what constitutional violations have been found in this case.

There has been extensive litigation concerning the nature of Plaintiffs' vaguely-asserted 14th Amendment claims, with the following result: the Court rejected a purely Equal Protection Clause claim on the well-established ground that "[w]ealth is not a suspect category in Equal Protection jurisprudence." *NAACP v. Jones,* 131 F.3d 1371, 1321 (9th Cir. 1997).[3] The Court held that "[t]o the extent CBAA frames plaintiffs' Equal Protection claim as one based purely on a 'wealth-based'

[3] The U.S. District Court for the Eastern District of California reached the same conclusion in considering a substantially identical lawsuit challenging Penal Code §1269b and Sacramento's bail schedule. *See Welchen v. Cnty. of Sacramento*, No. 2:16-cv-00185-TLN-KJN, 2016 WL 5930563 (E.D. Cal. Oct. 11, 2016).

classification (*see* CBAA's Motion at 13-14), the Court agrees, as a matter of legal theory, that wealth-based challenges generally do not warrant strict scrutiny." Dkt. 191, p.14. Instead, the Court held that Plaintiffs' challenge to the Bail Schedule is a hybrid Equal Protection / Due Process clause claim, in line with the *Bearden-Tate-Williams* line of cases. *See* Dkt. 191, p.14-15 (citing *Bearden* for the proposition that "[d]ue process and equal protection principles converge in the Court's analysis' in cases involving the fair treatment of indigents in the criminal justice system.").

Applying the *Bearden* framework, the Court ruled that strict scrutiny applies to Plaintiffs' claims, and that an Equal Protection/ Due Process violation will be established if the evidence demonstrates that (i) "the Sheriff's use of the Bail Schedule significantly deprives plaintiffs of their fundamental right to liberty," and (ii) "a plausible alternative exists which is at least as effective and less restrictive for achieving the government's compelling interests…" Dkt. 314, p. 40; *see also* Dkt. 191, pp.17. The Court ultimately found that question (i) is answered in the affirmative. *See* Dkt. 314, p. 31. Turning to question (ii), the Court considered Plaintiffs' longtime proposal of "rely[ing] solely on a computerized risk assessment process…for all members of the class" (Dkt. 221, p.2), coupled as it was with Plaintiffs' more recent argument that the passage of S.B.10 had "essentially implemented" their alternative and was a "more detailed version" of their alternative. Dkt. 314, p. 32.

It bears noting that Plaintiffs' contention that S.B.10 is essentially "the same" as Plaintiffs' proposed alternative, is at odds with the fact that S.B.10, once implemented, would eliminate the Bail Schedule for everyone, and would not be limited to class members. In discussing S.B.10 in their summary judgment motion, Plaintiffs did not clarify whether they were proposing a) implementation of the full scope of S.B.10 (e.g. wholesale elimination of the Bail Schedule for all arrestees), or rather, b) implementation of S.B.10's "framework" as applied to class members only, in line with their original "plausible alternative." Option (b) is the only conclusion that is consistent with Plaintiffs' case theory, constitutional claims, and prior requests for relief, and this appears to be the Court's view as well: in response to CBAA's concern that the plausible alternative would "eliminate use of the Bail Schedule for all arrestees," the Court responded that it "is not considering the wholesale elimination of bail as it is outside the scope of this action." Dkt. 314, pp.33-34. *See also* Dkt. 314, p.38, FN74 ("CBAA's argument that plaintiffs' proposal is more restrictive because it

would eliminate one current option for pre-arraignment release (albeit an option available only to non-class members who afford it) extends too far. As the Court has noted, this case presents a narrower question.").

The Court ultimately found that Plaintiffs had established an Equal Protection/ Due Process violation because they could point to an alternative that the Court found to be plausible, at least as effective, and less restrictive than the Sheriff's use of the Bail Schedule at achieving the government's compelling interests. Dkt. 314, p.40. Thus, the next question becomes: what relief is narrowly tailored to address the extent of the violation found? Dkt. 314, p.40; *Dayton Bd. Of Ed. v. Brinkman*, 433 U.S. 406.

The answer flows simply and logically from the Court's holdings to date: since Plaintiffs have established that enjoining bail for class members and "rely[ing] solely on a computerized risk assessment process…for all members of the class" would remedy the constitutional violation at issue (Dkt. 221, p.2), the Court need not – and should not – do more than issue an injunction putting that remedy into effect. The Court recognized this by stating that it "will issue an injunction enjoining the Sheriff from using the Bail Schedule as a means of releasing a detainee *who cannot afford the amount* [of bail]…" (Dkt. 314, p. 40 (emphasis added)), and also noted at the Hearing that the Court will seek to avoid being "heavy-handed" by granting relief that exceeds these parameters.

Relief limited to the class is line with the *Bearden* cases, which "do not stand for the far more sweeping proposition… that, whenever a person spends more time incarcerated than a wealthier person would have spent, the equal protection clause is violated." *Doyle v. Elsa,* 658 F.2d 512, 518 (7th Cir. 1981) (emphasis added). For example, in *Williams*, the Supreme Court held that where an Illinois statute that allowed a maximum imprisonment sentence to be extended so that those who could not afford the fine could "work off" the fine, the law worked "'an invidious discrimination' **as applied to indigent defendants** and therefore violated the Equal Protection Clause." Dkt. 191, p.14 (emphasis added); citing *Williams v. Illinois,* 399 U.S. 235, 242 (1970). The relief in *Williams* was narrowly tailored to preventing a State's imprisonment of indigent convicts beyond the maximum duration fixed by statute, but expressly did not extend to "the familiar pattern of alternative sentence of "$30 or 30 days," even though such a sentence obviously imposes imprisonment on the basis of

wealth. *Williams, supra,* 399 U.S. at 243-244.[4] In other words, in issuing relief that would remedy the constitutional violation, the *Williams* court was careful not to expand the scope of relief to an injunction prohibiting *any* differential treatment between rich and poor – relief that may arguably be warranted by a purely Equal Protection violation but was not warranted under the "hybrid" Equal Protection/ Due Process violation proven in that case.

Thus, Plaintiffs' sweeping proposition that the Court must enjoin the Bail Schedule as to *all* arrestees based on an Equal Protection theory, is supported neither by the classic "suspect class" analysis, nor by the hybrid Equal Protection / Due Process analysis under *Bearden.* The Court indicated as much when it "disagree[d] that these cases [*Bearden-Tate-Williams*] establish an unambiguous *constitutional right* not to be detained based on indigence as plaintiffs apparently suggest..." Dkt. 191, p. 16. Should the Court (properly) refuse to extend injunctive relief to non-class members, and should this result in class members' spending more time in pre-arraignment detention than non-class members, this will not lead to a constitutional violation under any 14th Amendment claim pled. Relief must be narrowly tailored to the scope of the constitutional violation Plaintiffs have pled and established, and the recently-proposed injunction is not tailored in that way.

IV. Conclusion

For the foregoing reasons, CBAA submits that any injunction issued in this case should be limited to members of the certified class, and should not extend to enjoining the Sheriff's use of the Bail Schedule to non-class members, e.g. those who can afford to post bail prior to arraignment.

Respectfully submitted,

Dated: April 1, 2019

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[4] *Williams* further noted that "[t]he State is not powerless to enforce judgments against those financially unable to pay a fine," and acknowledged a suggestion that the fine and costs could be collected from the indigent through an installment plan, rather than through jail time. *Id.* at FN 21.